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Supreme Court of the United States

OCTOBER TERM 1992

NATIONAL BASKETBALL ASSOCIATION,

Petitioner,

—v.—

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

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Respondents Chicago Bulls and WGN have completely misrepresented the decision and opinion of the Seventh Circuit in their effort to prevent review by this Court. That they deem such misrepresentation necessary demonstrates that respondents realize the actual holding below cannot be defended.

Even a cursory reading of the panel opinion shows that it rests upon the following (erroneous) propositions of law:

1. The NBA is a cartel, rather than a joint venture, in the sale of its output.

2. The necessity of maintaining competitive balance between the members of a sports league is ruled out as a

justification for any restraint on members' commercial competition by this Court's decision in *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

3. No restraint ancillary to a joint venture to cure the problem of free-riding is lawful if the free rider could be charged a fee (and even the fee might be illegal).

4. A professional sports league may not lawfully sell exclusive rights to its output.

Contrary to respondents' fanciful version of the opinion below, the Seventh Circuit rested its decision upon these broad and important legal grounds and not upon a Rule of Reason analysis of the facts or on any supposed failure of proof by the NBA.

In light of respondents' own previously published description of what the Seventh Circuit decided, respondents' current effort to portray that court's decision as a routine application of settled legal principles is amusingly disingenuous.

Respondents now say that "the lower courts did not announce new antitrust doctrine and did not adopt sweeping new rules of any sort. Instead, as the opinions below clearly state, the lower courts simply applied the Rule of Reason to a restraint adopted by the members of a partially integrated joint venture." Opp. Cert. 8.

But when the Seventh Circuit's decision was handed down, counsel of record for the Chicago Bulls proudly informed the antitrust world that "The Seventh Circuit's decision has been reported in the business and general press as having 'major ramifications for all professional sports leagues' and importance as well 'to virtually any joint venture, whether in sports or another industry.' Indeed, the court's antitrust analysis applies with equal force to the murky waters of joint ventures both inside and outside the sports arena." *Bulls Repeat*, LAW NEWS (Katten Muchin &

Zavis, Chicago, Ill.), July 1992, at 1, 3, *reprinted in* Reply App. 4a.[1]

Respondents' counsel displayed far greater candor about the importance and novelty of the Seventh Circuit's decision in their newsletter than they do in their Brief In Opposition.

1. ***Far from ruling on evidentiary sufficiency, the Seventh Circuit made explicit its pivotal and erroneous legal proposition: "The merits of the case turn on the characterization of the NBA [which is] .... a cartel in the sale of its output."*** App. 7a, 8a. Respondents assert that "[b]oth the District Court and the Seventh Circuit treated the NBA as a joint venture....," Opp. Cert. 14, and that this case is not worthy of review because it involves merely a routine application of long-fixed principles to restraints adopted by a joint venture. But this claim is obviously incorrect: The Seventh Circuit's opinion unambiguously stated that "[t]he merits of the case turn on the characterization of the NBA." App. 7a. That characterization was not, as respondents would have it, that the NBA was a joint venture, but that it was, in the words of the Seventh Circuit, "a cartel in the sale of its output."[2] App. 8a.

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[1] Elsewhere in their newsletter, counsel of record for respondents, in language that might well have appeared in the NBA's Petition, made clear why certiorari should be granted:

> This successful challenge of the NBA's restriction on the freedom of individual teams to broadcast their games in competition with the league's own national television package is of broad significance to joint ventures of all types and in all industries.

From the Editor's Desk, LAW NEWS (Katten Muchin & Zavis, Chicago, Ill.), July 1992, at 1, *reprinted in* Reply App. 1a.

[2] The cartel characterization was invoked to reject critical aspects of the NBA's justifications for the challenged regulation. For example, in casting aside the NBA's assertion that regulating individual teams' ability to televise NBA games nationally prevented the misappropriation of the league's jointly-owned national television rights, the Seventh Circuit wrote: "A cartel could

(continued...)

The holding that a professional sports league should be treated as a cartel for purposes of the Sherman Act is purely a conclusion of law, and it was, as the Seventh Circuit noted, outcome-determinative of this case.

It is impossible to understand why the NBA was called a cartel in the sale of its output. Neither the Seventh Circuit, the district court, nor the respondents give any explanation for that conclusion. The Seventh Circuit misperceived the NBA as a cartel in the sale of its output apparently because the league had not assumed complete control of national telecasting of NBA games from the beginning. But the need for a more stringent limit on individual teams' national telecasts became apparent only in recent years as two teams began national telecasting in competition with the league's own national contracts, thereby threatening the league's most critical source of shared revenues. The legality of this stricter limit, which constituted a move to more complete economic integration, cannot be denied on the ground that a league must forever achieve only that integration with which the league started. Such a rule would rest upon no comprehensible policy. It would, indeed, call into question the legality of the league itself: If additional efficiency-creating integration is illegal, why was the integration with which the league began lawful? There is no answer.

There is, in short, no support whatever for calling a professional sports league a "cartel in the sale of its output."

---

[2](...continued)
not insulate its agreement from the Sherman Act by giving certain producers contractual rights to sell to specified customers." App. 12a. Though the court below at times referred to the NBA as being, at least in part, a joint venture, the actual reasoning of the opinion rests squarely on the cartel characterization. Indeed, but for that characterization, the NBA's regulation of national telecasts by individual teams could never have been described, as it was by the Seventh Circuit, as a "'naked restraint,'" subject to condemnation after only a "quick look" as opposed to the usual Rule of Reason analysis that requires an assessment of market power. App. 11a (quoting *NCAA*, 468 U.S. at 109-10).

The issue of the appropriate treatment of a sports league for purposes of the Sherman Act is worthy of this Court's review because it affects the basic operations of a major American industry and is an issue that "has divided courts and scholars for some years." App. 8a. As noted in the Petition, ten years ago, the Chief Justice believed that this question was of sufficient importance that it should be reviewed by this Court. *See NFL v. North American Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari). It is certainly ripe for review now.

2. ***Competitive balance was rejected as a procompetitive justification as a matter of law.*** Respondents also attempt to characterize the Seventh Circuit's holding regarding competitive balance as turning on the facts -- here a purported failure of the NBA to show that its effort to regulate the national telecast of NBA games by individual teams enhanced competitive balance within the league. Opp. Cert. 15. But there was never any factual dispute -- indeed the proposition is self-evident -- that if individual teams cannot be prevented by league rules from competing against the league's national television contracts, only the strongest teams will be able to derive substantial income from national telecasts. The strong will get stronger and the weak weaker, thereby destroying competitive balance, and, quite likely, the league in anything like its present size and attractiveness to fans.

In fact, the district court found that absent the NBA's national television contracts (the proceeds of which are shared equally by all teams), 20 of the league's 27 teams would have lost money, and that the "prosperity of the league currently depends on the volume of the shared revenues generated by the league's economic activity on behalf of the teams and particularly on the revenues generated by the broadcast contracts with the national networks." App. 23a. The district court also found that the NBA's television policy was a principal reason for the league's "financial health," and that "[a] significant strategic part of the league's television policy since 1982 has been to restrict the number of games in the market which compete with the league's national contracts." App. 26a.

Expressly acknowledging that "disparities in revenues have an impact on competition on the court," App. 25a, the district court found:

> The richest teams enjoy competitive advantages on the court over the poorest teams -- in the ability to bid for free agents or to pay to keep their own players who opt for free agency, and so field a strong team; in the ability to charter flights for away games, and so field an alert team; in the ability to hire top notch staffs, and so field a well-coached team, and more.

Id.

None of this was in dispute below. The Seventh Circuit did not find, as respondents assert, that there was a failure of proof. Instead it held, erroneously, that it was constrained by *NCAA* to reject the competitive balance justification as a matter of law:

> The NCAA argued that restrictions on the number of games telecast spread revenues and exposure among universities, helping to produce balanced competition on the field and hence making the games actually telecast more exciting, to the benefit of fans.... The Supreme Court found the argument unpersuasive. It is hard to see how similar balance arguments by professional leagues ... could be more compelling[ ] [u]nless the Supreme Court is prepared to modify *NCAA*....

App. 16a.

There is no need to modify *NCAA*. In that case, this Court agreed that "maintaining a competitive balance ... is legitimate and important," 468 U.S. at 117, but properly concluded that the NCAA's television restrictions did not serve that purpose: "The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any one league. The plan is nationwide in scope and there is no single league or tournament

in which all college football teams compete." *NCAA*, 468 U.S. at 117-18. That is exactly the distinction that demonstrates why professional sports leagues, unlike the NCAA, have a "legitimate and important" interest in maintaining competitive balance.

Other courts do not read *NCAA* as the Seventh Circuit does. After the decision in this case, a district court in the Eighth Circuit submitted to the jury the question of whether competitive balance among NFL teams was promoted by certain restraints on the ability of professional football players to move as free agents from one team to another. *McNeil v. NFL*, No. 4-90-476 (D. Minn. filed June 27, 1990). Thus, consistent with the reasoning of *NCAA*, but dramatically at odds with the decision of the Seventh Circuit, competitive balance was treated as a valid procompetitive justification. This Court should dispel the confusion that surrounds this issue.

3. The Seventh Circuit's new rule that free-riding may not be prohibited if it can instead be taxed is an erroneous principle of law. Respondents' attempt to evade the novelty and importance of the Seventh Circuit's holding concerning free-riding rests upon two false predicates. First, respondents claim that the Seventh Circuit's entire discussion of free-riding, which represents a substantial portion of the opinion, is mere dictum. Opp. Cert. 18. To the contrary, the Seventh Circuit found the question to be central and introduced its holding on the issue with the statement that "the NBA's contention that its TV policy controls free-riding deserves serious analysis." App. 13a. The panel's holding, which is in conflict with decisions of this Court and decisions of other circuits, was simply that an ancillary restraint may not be employed where a tax on the free rider is possible. The panel did not mention any failure of proof, as respondents claim, but based its holding entirely on its erroneous proposition of law.

Respondents next try to avoid the significance of the Seventh Circuit's free-riding holding by recasting it in the guise of the least restrictive alternative doctrine. Opp. Cert. 18-19. But the Seventh Circuit's opinion contains no hint that its free-riding analysis had

anything to do with the notion of a less restrictive alternative and the opinion cannot fairly be so read. The panel stated that "by selecting the tax carefully, the NBA could induce the Bulls to broadcast 20 games, neither more nor less, on WGN." App. 15a. A tax that results in precisely the same reduction in Bulls' national telecasts can in no sense be characterized as less restrictive.

Nowhere do respondents make any effort to defend the Seventh Circuit's actual holding that no restraint ancillary to a joint venture to cure the problem of free-riding is lawful if the free rider could be charged a fee. The failure to defend that holding constitutes a concession that the Seventh Circuit's new rule is contrary to this Court's decisions and those of other circuits.

4. ***The Seventh Circuit's rejection of the NBA's exclusivity justification threatens a widespread practice that is beneficial to competition in the television industry.*** According to the Seventh Circuit, exclusive television licenses are generally beneficial to competition when employed by a joint venture, but not when utilized by an entity that is "a cartel in the sale of its output." Because the court erroneously held the NBA to be such a cartel, it rejected the league's exclusivity justification. Respondents attempt to disguise this legal conclusion as a fact-bound ruling by asserting that the NBA "failed to sustain the alleged [exclusivity] justification in the trial court because of a complete lack of evidence...." Opp. Cert. 20. But this response finds no support whatever in the Seventh Circuit's decision, which nowhere suggests any lack of evidence. Indeed, the Seventh Circuit expressly held that if the NBA were characterized as a joint venture and therefore "not fundamentally different from *Star Trek: The Next Generation*," the NBA's exclusivity justification would have been upheld:

> [P]roducers of a television series commit the episodes exclusively to one network (or one station in a local market) in order to compete against the offerings of other ventures.... Marketing strategies such as exclusivity and limits on the number of episodes

> produced per year then must be understood as ways to compete rather than ways to exploit consumers.

App. 8a.

The NBA, however, was not entitled to rely upon this justification solely because it was held to be a cartel in the sale of its output. But the Seventh Circuit's distinction between the NBA and the joint venture that produces *Star Trek: The Next Generation* is without merit. App. 8a. A sports league is more certainly and completely an integrated joint venture than the temporary alliances of television program producers "who are competitors at other times." *Id.* Either sports leagues' efforts to achieve greater or complete exclusivity should be held to be "ways to compete rather than ways to exploit consumers," *id.*, or all joint ventures' efforts, including *Star Trek's*, should be held unlawful naked restraints. Choosing the latter alternative would be disastrous for producers and consumers alike.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

From the Editor's Desk, LAW NEWS (Katten Muchin & Zavis, Chicago, Ill.), July 1992, at 1:

LAW NEWS *Antitrust*

Volume 3, No. 2 KATTEN MUCHIN & ZAVIS

From the Editor's Desk:

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KMZ's Antitrust Practice Group fielded a winning trial and appeal team in the Chicago Bulls' and WGN-TV's recent repeat victory over the National Basketball Association. This successful challenge of the NBA's restriction on the freedom of individual teams to broadcast their games in competition with the league's own national television package is of broad significance to joint ventures of all types and in all industries. The impact of plaintiffs' winning a Rule of Reason trial and then a 3-0 appellate decision will be felt all the more coming from the Seventh Circuit Court of Appeals — perhaps the most conservative antitrust court in the country.

◆ ◆ ◆

Joel G. Chefitz, Chairman
Antitrust Practice Group

Bulls Repeat, LAW NEWS (Katten Muchin & Zavis, Chicago, Ill.), July 1992, at 1, 3:

LAW NEWS *Antitrust*

Volume 3, No. 2 KATTEN MUCHIN & ZAVIS

BULLS REPEAT

Not only on the court — but also in the courts — the Chicago Bulls reign again over the National Basketball Association. The Bulls, along with their television outlet WGN-Ch.9 (Chicago), netted a repeat victory over the NBA when the Seventh Circuit U.S. Court of Appeals recently affirmed the trial court's permanent injunction last year striking down on antitrust grounds the NBA's limit on the number of games a team may show on TV "superstations" — such as WGN-TV, WTBS (Atlanta) and WWOR-TV (New York). The decision, *Chicago Professionals Sports Limited Partnership v. National Basketball Ass'n*, 961 F.2d 667 (7th Cir. 1992), was termed by *Crain's Chicago Business* as a "blow out" and by the *Chicago Tribune* as a "major victory." The Bulls drafted their victorious trial and appellate team entirely from KMZ's Antitrust Practice Group.

As reported in previous issues of this newsletter, the Chicago Bulls and WGN filed their complaint in late October 1990, asserting among other things that a number of the NBA's restraints on the freedom of individual teams to televise their games violated section 1 of the Sherman Act. After several weeks of expedited

discovery, the case went to trial before Senior U.S. District Judge Hubert L. Will on the plaintiffs' requests for permanent injunctive relief from the NBA's latest restriction on teams' telecasts over superstations — local stations whose broadcasts are carried by cable systems across the country. In the belief that games on superstations compete with and diminish the value of the NBA's own national TV contracts, the league had reduced the number of games the Bulls or any other team could broadcast on a superstation to 20 per season. The trial culminated with a permanent injunction against enforcement of the new restriction, thus bringing to an abrupt halt the league office's designs of eventually phasing out superstation broadcasts altogether. The NBA appealed.

The trial court found, and the Seventh Circuit unanimously agreed, that the NBA, as a joint venture of competing sellers of broadcast rights to NBA basketball, had illegally restricted output of televised NBA basketball. Because the 20-game superstation limit restricted output, the NBA had the burden of establishing "some justification — some explanation connecting the practice to consumers' benefits." But at trial and again on appeal the NBA failed to prove any legitimate justification for the output limitation, despite its argument that the restriction prevented "misappropriation" of league property rights and "free riding." Thus there was no need to engage in the extended market analysis that is ordinarily part of a Rule of Reason antitrust case. Rather, the restriction was properly condemned on the "'quick look' version of the Rule of Reason."

On June 4, 1992, the Seventh Circuit denied the NBA's petition to rehear the appeal. That leaves the NBA with the sole recourse of seeking discretionary review by the U.S. Supreme Court, a request the NBA has stated it intends to make. In the meantime, the Bulls will televise 30 games on WGN next season under an interim agreement with the NBA. That is 20 more than

the 10 Bulls games that would have been permitted next year had the NBA succeeded with its planned phase-out of all superstation broadcasts.

IMPACT: The Seventh Circuit's decision has been reported in the business and general press as having "major ramifications for all professional sports leagues" and importance as well "to virtually any joint venture, whether in sports or another industry." Indeed, the court's antitrust analysis applies with equal force to the murky waters of joint ventures both inside and outside the sports arena. The ruling means that any cooperative joint venture of separate businesses must have substantial procompetitive justifications in hand before restricting the individual output of the joint venturers.

We are pleased to have played a pivotal role in this important case. In a time when lawyers are criticized by clients, judges and politicians alike for inefficiencies and delays in litigation, the Seventh Circuit commented that we brought the case to trial "like greased lightning" and that the seven-week period from the filing of our complaint to trial "is unheard of in antitrust litigation." The members of KMZ's Antitrust Practice Group who successfully represented the Bulls at trial and on appeal of this case are Joel Chefitz, Steve Libowsky, Jim Hanlon, Andy Hale and Laura Keidan.

Antitrust Practice Group

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